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No. 88-1165

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

COUNTY OF SONOMA,
Petitioner,

VS.

JOHN S. HERRINGTON,
DAVID S. HERRINGTON,
QUAIL HILL RANCH, a Partnership,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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Rule

Federal Rules of Civil Procedure Rule 50(b) 1, 9, 10

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The respondents' brief in opposition does not deny the conflict between the Ninth Circuit's narrow interpretation of Rule 50(b) and the liberal application it has received in the other Circuits. Nor does it take issue with the questions presented, including the County's position that *St. Louis v. Praprotnik*, 108 S.Ct. 915 (1988) forecloses section 1983 liability predicated on the actions of junior planning staff members. By not denying the presence or importance of these questions, respondents essentially concede the worthiness of the legal issues for certiorari.

I. THIS CASE ENABLES THE COURT TO DEFINE THE SCOPE OF SECTION 1983 LIABILITY IN LAND USE PLANNING

Respondents argue, instead, that the County should not be able to apply *Praprotnik* to this case because *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) put the County on notice of the valid section 1983 defense subsequently articulated in *Praprotnik*. Respondents' Brief 9-10 & n.5. According to respondents, *Monell* defined the liability of government for isolated and unauthorized acts of municipal employees; and the County's failure to articulate that defense at the trial should foreclose this Court's consideration of it here.

Two passages of the *Praprotnik* decision belie respondents' claims. First, *Monell* hardly resolved the scope of municipal liability; it only began a task whose completion would require additional attention of the Court:

> In *Monell* itself, it was undisputed that there had been an official policy requiring city employees to take actions that were unconstitutional under this Court's decisions. Without attempting to draw the line between actions taken pursuant to official policy and the independent actions of employees and agents, the *Monell* Court left the "full contours" of municipal liability under section 1983 to be developed further on "another day." 436 U.S., at 695.

Praprotnik, 108 S.Ct. at 923.

Second, petitioner cannot be faulted because its section 1983 defense did not become more articulate until petitioner reached the Court of Appeals:

> In the case before us, the focus of petitioner's challenge is not on the jury instruction itself, but on the denial of its motions for summary judgment and a directed verdict. Although the same legal issue was raised both by those motions and by the jury instruction, "the failure to object to an instruction does not render the instruction the 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict."

> .... Petitioner's legal position in the District Court—that respondent had failed to establish an unconstitutional municipal policy—was consistent with the legal standard that it now advocates. It should not be surprising if petitioner's arguments in the District Court were much less detailed than the arguments it now makes in response to the decision of the Court of Appeals. That, however, does not imply that petitioner failed to preserve the issue raised in its petition for certiorari. Cf. *post*, at 936 (Stevens, J., dissenting). Accordingly, we find no obstacle to reviewing the question presented in the petition for certiorari, a question that was very clearly considered, and decided, by the Court of Appeals.
>
> We note, too, that petitioner has throughout this litigation been confronted with a legal landscape whose contours are "in a state of evolving definition and uncertainty." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981). We therefore do not believe that our review of the decision of the Court of Appeals, a decision raising a question that "is important and appears likely to recur in § 1983 litigation against municipalities," *id.* at 257, will undermine the policy of judicial efficiency that underlies Rule 51. The definition of municipal liability manifestly needs clarification, at least in part to give lower courts and litigants a fairer chance to craft jury instructions that will not require scrutiny on appellate review.

Praprotnik, 108 S.Ct. at 922.

Indeed, this description applies even more aptly to the present case, where the County's trial counsel attempted to articulate the County's defense in a motion for directed verdict, and was cut off by Judge Weigel:

> THE COURT: Let me ask you this, Counsel. Would you be satisfied with this? It seems to me that under the applicable law, that the Court could not properly direct a verdict. If the other side would stipulate that you've made your motion on all available legal grounds just as though they were set forth in full, or supposing the other side would stipulate—that's all right—all available legal grounds, would you be satisfied then to proceed?

MR. CAREY: I would like to argue this motion.

THE COURT: I'll allow you five minutes to argue it and that's all. Again, at the end of five minutes, I am going to curtail argument.

MR. CAREY: I'll speed it up.

R.T. 7-4 to 7-5.

In sum, from *Monell's* decision to the present the law was not so firm and certain as to foreclose the propriety and necessity of this Court's review of the present case. Three days ago the Court reaffirmed that in section 1983 municipal liability "the inquiry is a difficult one; one that has left this Court deeply divided in a series of cases that have followed *Monell*." *Canton v. Harris*, No. 86-1088, slip opinion at 6 (Feb. 25, 1989). Respondents would cut off the County in their conviction and that of the Ninth Circuit that "*Monell* required a showing that the acts of a public official must represent official policy before Section 1983 liability can be imposed." Respondents' Brief 9-10. Three days ago this Court held the opposite. *Canton v. Harris*, *supra*, slip opinion at 6-8. Contrary to respondents' claim, the "contours" have "evolved" as neither the Ninth Circuit, petitioner, nor respondents could anticipate.

This case remains worthy of *certiorari* to resolve the scope of a County's section 1983 liability in the growing body of land-use litigation.

The Court has just spoken with respect to police training, making clear that section 1983 liability requires (1) that a municipal employee's individual fault flows from the municipality's deliberate indifference to the needs of citizens, and (2) that the municipal indifference actually caused the injury. *Canton v. Harris*, slip opinion at 10-12. These strict standards of fault and causation are needed, in the Court' unanimous view, to foreclose "unprecedented liability." To secure that end, juries and federal courts must not be allowed to award damages based on their speculation of how a city or county might have differently designed its municipal programs. *Id.* at 12-13.

The same considerations of federalism apply to the more discretionary municipal governance of land use. This Court must

restate *Canton v. Harris* in the planning context: developers must prove the individual planners' actions were allowed to reflect a deliberate County indifference to the fairness of its procedures, and that this indifference—rather than the supervisors' rejection of a preliminary approval on the merits—caused a cognizable injury. Without such guidance, federal juries and courts will become—as they did in this case—the land use agencies of the nation's cities and counties.

II. THE NINTH CIRCUIT FAILED TO HONOR *ST. LOUIS V. PRAPROTNIK*

Respondents erroneously assert, in continuing their *Praprotnik* discussion, that the Ninth Circuit responded to the County's *Praprotnik* defense. Respondent's Brief 10. The entire paragraph of the Ninth Circuit from which respondents selectively quote goes to the heart of the present petition:

> We have little difficulty in concluding that evidence was presented to support a finding of liability pursuant to the Herringtons' procedural due process claim. The Herringtons provided evidence that they were deprived of notice and an opportunity to be heard in regard to certain key decisions regarding their property. In addition, the Herringtons provided evidence that documents submitted to the County in support of their development application had been tampered with in order to present the proposal in an unfavorable light. Of course, the County's interpretation of these incidents differs from the Herringtons' interpretation. In particular, the County argues that the County cannot be held responsible for the misdeeds of staff employees. However, the County did not request a jury instruction distinguishing the acts of County staff from the acts of County officials. The jury found the County to be responsible for the misdeeds in question. We cannot conclude that the Herringtons' evidence provides no support to a verdict of procedural due process violations.

App. C at A-29 to A-39, 834 F.2d at 1501.

Thus the Ninth Circuit, writing before *St. Louis v. Praprotnik* was filed, rejected the County's claims that parallel those of the

City of St. Louis.[1] After *Praprotnik* was filed, the County sought Ninth Circuit rehearing by a supplemental petition; the subsequent amendment to Ninth Circuit decision did not touch this claim. See Petition for Certiorari 10. It remains true that "the appellate tribunal did not even address, let alone follow, the *Praprotnik* decision." *Id.*

III. THE RECORD PROVES THE FATAL ERROR OF THE NINTH CIRCUIT'S UNIQUE INTERPRETATION OF RULE 50(b)

Respondents, in concluding their discussion of *Praprotnik*'s ruling, then seriously misstate the record in an effort to prove that the Board of Supervisors denied due process. The County recognizes that a petition for certiorari does not serve to ventilate factual disputes with the respondents. But the County will respond here to the mischaracterizations on pages 11 and 12 of the respondents' brief for the narrow purpose of assuring this Court that the County's petition is grounded in *uncontested* and accurately-presented facts.

Respondents would first have the Court believe that prior to the Board of Supervisors' hearing of 11 December 1979, respondents were denied the opportunity to rebut the staff and agricultural advisory committee opposition to their project. Respondents ignore two uncontroverted elements of the record: (1) On 5 December 1979, attorney John S. Herrington sent a detailed, five-page letter to each supervisor, presenting his case and challenging

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[1] The County asserted: "The County is not liable for the actions of inferior officials that are not the final decision or policy makers," Brief of Appellant 29, *et seq.* and "Because the 'jury instructions' raise legal and not factual issues, the [County's] acquiescence in them—after moving for directed verdict—does not waive the County's claims of law in this Court," Appellant's Reply Brief 8, *et seq.* These presentations of the issues are sufficiently "exact" to survive respondents' claim that they should not be considered here. *Cf. Canton v. Harris, supra*, slip opinion at 5. The issues were clearly considered in the Court of Appeals.

the conclusions of the staff and agricultural committee, Tr. Ex. 37;[2] (2) at trial the same John Herrington testified as follows:

> Q. (By Mr. Carey) You did attend the meeting in August of 1979 regarding your consistency appeal, did you not?
>
> A. Which one?
>
> Q. Before the Planning Commission.
>
> A. Yes.
>
> Q. And you were allowed to present all evidence at that time that you wanted to present in support of your position?
>
> A. Yes.
>
> Q. And the staff presented—made a presentation at that meeting in opposition to your position, did they not?
>
> A. We had two—two Planning Commission meetings, both times for 32 lots. Both times the staff opposed us; both times they [the commission] found us consistent for 32 units.

---

[2] Mr. Herrington there exercised his opportunity to criticize one staff member's alteration of a document. Tr. Ex. 37, at 2. In their brief in opposition, respondents claim the staff deleted "only those portions which related to the agricultural issues to be addressed by the committee." Respondents' Brief 8, n.3. This assertion is plain false. Three and one-half paragraphs of the document's 18 paragraphs were excised: one was entitled "circulation," another "sewer/water/fire protection." The deleted half-paragraph described the general plan designations, but the remaining paragraphs under this topic recorded respondents' contention that their project was consistent with the plan. The final deleted paragraph referred to an offer of open space dedication—with *no* reference to agricultural use or productivity—but the undeleted five paragraphs on the same topic described in detail the proposed use of open space. Compare Tr. Ex. 9, 35. The County recites this detail to assure the Court of the accuracy of our representations in the petition at 8-9, and that if the Court grants certiorari to address the questions of law, it will find the County has accurately described the record that necessarily frames these legal issues.

Q. And both times you were afforded an opportunity to make a presentation, were you not?

A. Correct.

Q. And subsequent to that determination, the consistency matter was appealed to the Board of Supervisors, correct?

A. Yes.

Q. And the Board of Supervisors held a public hearing on this subject which you attended, correct?

A. Yes.

Q. An you were afforded the opportunity to make all presentations that you wished to at that hearing.

A. Yes.

Q. And the staff made a presentation at the hearing in opposition to the consistency, correct?

A. Yes.

Q. And the public hearing was cut off and the board discussed amongst themselves the material which had been presented to them and voted, correct?

A. Yes.

Q. And they voted unanimously to find your project inconsistent with the general plan; is that correct?

A. Yes. I'm not sure of the vote. Was is a unanimous vote? I think it was.

R.T. 3-138 to 3-139.

Thus respondents' own testimony shows they were accorded due process, and that they were denied the consistency determination not because of staff actions, but because of the supervisors' exercise of their lawful discretion to govern land use.

Respondents would also have this Court believe that the supervisors subsequently acted on 4 March 1980 with neither notice nor opportunity to be heard. For example, respondents

assert that the "Board of Supervisors gave *no notice* to Property Owners of the hearing (Property Owners received notice of the hearing from a third party) (RT II 157)." Respondents' Brief 12 (emphasis the respondents'). The cited page of the reporter's transcript shows that while witness David Herrington stated he did not personally receive notice, "our engineer" who "kept track of it" had received notice. R.T. 2-157. The record also shows that not only did respondents have and receive notice, but also that attorney John S. Herrington on 27 February 1980 submitted comments to each supervisor before the board's vote on 4 March. Tr. Ex. 46; see Petition for Certiorari 8, n.3. Again, due process was afforded.

Why then, the Court may wonder, did the Ninth Circuit sustain the County's due process liability? The answer: because the Ninth Circuit's failure to treat Rule 50(b) as have the other Circuits led the Court of Appeal to apply the wrong standard of review. The Ninth Circuit's key paragraph, quoted above, begins, "We have little difficulty in concluding that *evidence was presented* to support a finding of liability . . ." and ends, "we cannot conclude that the Herringtons' evidence provided *no* support . . ." App. C. at A-29, 834 F.2d at 1501 (emphasis added).

In its preceding paragraph the appeals court set up its erroneous premise: because the Ninth Circuit deemed Rule 50(b) a bar to the County's challenge of the *sufficiency* of the evidence, the reviewing court would only test for an "absolute absence of evidence," and be satisfied with "any evidence" to support the verdict. App. C. at A-28 to A-29; 834 F.2d at 1500.

The County submits that the respondents' brief, with its selective citations to the record, vividly demonstrates the distorted result that flows from the Ninth Circuit's failure to grant the County regular appellate review in this case. A review of the sufficiency of evidence—looking at the entire record, for qualification and explanation of the elements on which respondents (not always accurately) rely, and then judging the case by the entire set of uncontroverted facts—would lead to a reversal of the judgment on liability.

In sum, this record presents one ideally suited not only to apply *Praprotnik* and *Canton v. Harris* to section 1983 land use litigation, but also to correct the Ninth Circuit's departure from the other Circuits' application of Rule 50(b): a case in which the misapplication made a fatal difference.

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Respectfully submitted,

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